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In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether the appellees' challenge to the constitutionality of the Act presents a justiciable controversy.

2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-33a) is not yet reported.

JURISDICTION

The order of the district court was entered on February 12, 1998. A notice of appeal (J.S. App. 34a-35a) was filed on February 13, 1998. This Court noted probable jurisdiction on February 27, 1998. The jurisdiction of this Court rests on 2 U.S.C. 692(b) (Supp. II 1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, is reproduced at J.S. 2.

2. The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), is reproduced at J.S. App. 36a-60a.

3. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, is reproduced at J.S. App. 72a.

4. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, is reproduced at J.S. App. 72a-74a.

STATEMENT

1. The Line Item Veto Act, 2 U.S.C. 691 *et seq*. (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. In September 1789, the First Congress appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The First Congress subsequently enacted two additional general appropriations laws, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1579 (1974). By appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a

ceiling upon the amount which should be expended for that activity.").

The laws passed by the First Congress vested Executive Branch officials with a second form of discretion as well. Those laws provided what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. The President was thereby given discretion not only with respect to the amount of the appropriated sum that would be spent, but also with respect to its allocation among authorized uses.

Shortly after the First Congress, appropriations laws began to make increased use of earmarked, rather than lump-sum, appropriations. See Abascal & Kramer, *supra*, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to move appropriations within departments In 1809, Congress vested the President with recess authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department, be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536. That authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 148 & nn.71-72 (1972). Congress continued to resort to lump-sum appropriations when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. See *id.* at 136.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. Congress authorized the President to "reduce [governmental] expenditures" by abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-

415)). All appropriations "unexpended by reason of" the President's exercise of his reorganization authority were to be "impounded and returned to the Treasury." *Id.* at 1519. Congress also conferred discretionary impoundment authority in the Department of War's 1933 appropriations act, which authorized the President to impound "[a]ny sums appropriated in this Act for or on account of the Military Establishment, or any portion of such sums, that may not be needed for the purposes for which appropriated." Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.

In 1950, Congress provided the Executive Branch with general authority to establish "reserves"—that is, to withhold the expenditure of appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Congress further provided that appropriations and contract authorization made by the Act for the Executive Branch were to be reduced by "at least" $550 million below appropriated levels; apart from specifying that the reductions not "impair[] national defense," Congress did not prescribe what spending to reduce or how large particular reductions should be. § 1214, 64 Stat. 768.

During the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, 62 Geo. L.J. at 1569 & n.90; Fisher, 37 Law & Contemp. Probs. at 160-161. The Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-272, imposed strict ceilings on budget outlays and new obligation authority for the next fiscal year. To meet those ceilings, Congress authorized the President to reserve as much as $6 billion in outlays and $10 billion in new obligation authority, with no restrictions on the President's discretion regarding what spending to reduce. §§ 202(b), 203(b), 82 Stat. 272. Congress provided the President with similar authority in

subsequent years. See Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the appropriations involved to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (Feb. 5, 1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974). The courts resolved those disputes by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over expenditure of the impounded funds. In *Train* v. *City of New York*, 420 U.S. 35 (1975), for example, this Court held that the President lacked authority to impound funds appropriated for grants under Title II of the Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 833. The Court reviewed the text and history of the Act to determine whether "Congress intended to confer any discretion on the Executive to withhold funds from this program." 420 U.S. at 44. The Court and the parties presupposed that Congress could, if it chose, vest the Executive Branch with such discretion; the only issue was whether it had chosen to do so.

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub.

L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of spending of appropriated funds). See 2 U.S.C. 682(1), 682(3). While generally authorizing the President to carry out deferrals, see 2 U.S.C. 684 (1982), the Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). The ICA also narrowed the circumstances in which the Executive Branch could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 36a-60a) (codified at 2 U.S.C. 691 *et seq.* (Supp. II 1996)). The Act expires on January 1, 2005. 2 U.S.C. 691 note (Supp. II 1996). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996).

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." 2 U.S.C. 691(a) (Supp. II 1996). A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified for a particular purpose in an appropriations law or is otherwise identified through charts, documents, calculations, or references to other laws. 2 U.S.C. 691e(7)(A) (Supp. II 1996). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through

annual appropriations. 2 U.S.C. 691e(8) (Supp. II 1996).[1] A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that gives "temporary or permanent transitional relief" to ten or fewer beneficiaries. 2 U.S.C. 691e(9)(A) (Supp. II 1996).[2]

Cancellation of a dollar amount of discretionary budget authority operates to "rescind" that authority. 2 U.S.C. 691e(4)(A) (Supp. II 1996). Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." 2 U.S.C. 691e(4)(B) and (C) (Supp. II 1996). The President may not use funds covered by a cancellation for any purpose other than deficit reduction. 2 U.S.C. 691b(b), 691c (Supp. II 1996). Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. 2 U.S.C. 691c(a) and (b) (Supp. II 1996); H.R. Conf. Rep. No. 491, *supra*, at 23-24.

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[1] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 691e(5) (Supp. II 1996). An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See 2 U.S.C. 691e(8) (Supp. II 1996); see also H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 36 (1996). An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

[2] The Act provides for the Joint Committee on Taxation to identify the limited tax benefits contained in any revenue bill. 2 U.S.C. 691f(a) (Supp. II 1996). If Congress incorporates the Joint Committee's statement into the law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. 2 U.S.C. 691f(b) and (c) (Supp. II 1996).

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after enactment of the law containing the cancelled item. 2 U.S.C. 691(a)(B), 691a(c)(1) (Supp. II 1996). The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). He must also consider "the legislative history, construction, and purposes of the law" containing the item, as well as "any specific sources of information referenced in such law." 2 U.S.C. 691(b)(1) and (2) (Supp. II 1996). In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. 2 U.S.C. 691a(b) (Supp. II 1996).

A cancellation takes effect upon Congress's receipt of the President's special message. 2 U.S.C. 691b(a) (Supp. II 1996). The Act provides for highly expedited legislative consideration of "disapproval bills." 2 U.S.C. 691d, 691e(6) (Supp. II 1996). If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. 2 U.S.C. 691b(a) (Supp. II 1996). A disapproval bill is not subject to the President's cancellation authority under the Act. 2 U.S.C. 691(c) (Supp. II 1996).

Although the Line Item Veto Act establishes general rules for the execution of budgetary laws, nothing in the Act purports to prevent Congress from determining that the President's cancellation authority shall not apply to a particular spending or revenue bill or any portion thereof. See *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997) (Congress

may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act").

3. The Line Item Veto Act took effect on January 1, 1997. See 2 U.S.C. 691 note (Supp. II 1996). Immediately thereafter, several Members of Congress filed an action for declaratory relief, contending that the Act violates Article I of the Constitution and principles of separation of powers. The district court ruled in favor of the plaintiffs, holding that they had standing and that the Act is unconstitutional. *Byrd* v. *Raines*, 956 F. Supp. 25 (D.D.C. 1997). On appeal, this Court vacated the district court's judgment, holding that the plaintiff Members of Congress lacked standing under Article III. *Raines* v. *Byrd*, *supra*.

4. At the time of this Court's decision in *Raines*, the President had not yet cancelled any spending or revenue item pursuant to the Act. Since then, the President has exercised his cancellation authority on several occasions. The present litigation arises out of two specific cancellations.

a. The first cancellation involves a spending provision that granted the State of New York preferential treatment regarding federal payments under the Medicaid program. States that participate in the Medicaid program receive matching funds from the federal government, which are based on a State's allowable medical assistance expenditures. See generally 42 U.S.C. 1396b(a). Under amendments enacted in 1991, the amount of a State's allowable medical assistance expenditures is reduced by the revenue that the State receives from health care related taxes unless, *inter alia*, the taxes are "broad based." 42 U.S.C. 1396b(w)(1)(A)(ii). If a particular health care related tax does not satisfy the statutory criteria for "broad based" taxes (see 42 U.S.C. 1396b(w)(3)(B) and (C)), the State may file a waiver application with the Secretary of Health and Human Services (HHS) requesting that she nevertheless "treat [the] tax as a broad-based health care related tax." 42 U.S.C. 1396b(w)(3)(E)(i). The Secretary must approve the application if the State establishes that the net impact

of the tax and associated expenditures proposed by the State is "generally redistributive in nature" and that the amount of the tax is not "directly correlated" to payments under the federal Medicaid Program for the items and services on which the tax is imposed. 42 U.S.C. 1396b(w)(3)(E)(ii).

The waiver application is reviewed by the Health Care Financing Administration (HCFA), an agency within HHS. See 42 C.F.R. 433.68, 433.72. If HCFA determines that a tax is not a broad-based health care related tax and denies a request for a waiver, the result is to effect a deduction from the State's covered medical asistance expenditures to that extent, and the amount of the federal payments to the State is reduced accordingly. See 42 U.S.C. 1396b(w)(1)(A); 42 C.F.R. 433.70(b). The State may appeal any such disallowance to the Department's Grants Appeals Board, see 42 C.F.R. 430.42; 45 C.F.R. Part 16 (procedures for such appeals); J.S. App. 6a-7a; J.A. 38-39, and then may seek judicial review of the final decision of the Board in federal district court pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. See *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

In 1994, HCFA notified the State of New York that certain health care related taxes levied by the State are not "broad based" and therefore must be taken into account in calculating the State's federal Medicaid payment. See J.S. App. 6a-7a. The State subsequently filed over 60 applications for waivers. *Ibid.* As of this date, no formal action has been taken by HCFA on any of New York's pending waiver applications. *Ibid.* While the applications remain pending, the state taxes at issue are disregarded in determining New York's allowable medical assistance expenditures. See J.A. 39. As a result, no reduction in federal Medicaid payments to New York has taken place. *Ibid.*

On August 5, 1997, the Balanced Budget Act of 1997 was enacted into law. Pub. L. No. 105-33, 111 Stat. 251. Section 4722(c) of the Act provided that health care related taxes collected by New York before June 1, 1997, for which

waiver applications were still pending, "are deemed to be permissible health care related taxes and in compliance with the requirements of [42 U.S.C. 1396b(w)(3)(B) and (C)]" for broad based taxes. 111 Stat. 515; J.S. App. 72a. On August 11, 1997, the President sent Congress a special message (see p. 11, *supra*) cancelling Section 4722(c) as an "item of new direct spending" under the Act. J.S. App. 61a-65a.

b. The second cancellation at issue here involves a tax provision that would have given special treatment to a small class of agricultural stock sales. As a general matter, Section 1042 of the Internal Revenue Code permits taxpayers to defer recognition of capital gains from the sale of certain stock to employee stock ownership plans (ESOPs) or eligible worker-owned cooperatives. 26 U.S.C. 1042. The capital gains are not recognized until the taxpayer sells the replacement property purchased with the proceeds of the original sale. Section 1042 thus defers, but generally does not eliminate, the capital gains tax on such transactions. Because the capital gain accrues to the seller, Section 1042 affects the tax liability of the seller rather than that of the buyer.

On August 5, 1997, the Taxpayer Relief Act of 1997 was enacted into law. Pub. L. No. 105-34, 111 Stat. 788. Section 968 of the Act added a new subsection (g) to 26 U.S.C. 1042 to extend its coverage to taxpayers who, after December 31, 1997, sell stock of a domestic corporation that is a "qualified" refiner or processor of agricultural or horticultural products to an "eligible" farmers' cooperative. 111 Stat. 895-896; J.S. App. 72a-74a. Section 1701 of the Taxpayer Relief Act contained an "identification of limited tax benefits subject to line item veto," 111 Stat. 1099, and Section 968 was listed among those provisions, see *id.* at 1101. On August 11, 1997, the President sent Congress a special message cancelling Section 968 (as well as another provision of the Taxpayer Relief Act). J.S. App. 66a-71a.

c. The instant case involves two suits filed in October 1997 pursuant to the special judicial review provision of

the Line Item Veto Act, 2 U.S.C. 692 (Supp. II 1996). The first suit, *City of New York* v. *Clinton*, Civ. No. 97-2393 (D.D.C.), challenged the President's cancellation of Section 4722(c) of the Balanced Budget Act. Although Section 4722(c) concerned federal payments to the State of New York, the State itself did not file suit and is not a party to this case. Instead, the suit was filed by the City of New York, the New York City Health and Hospitals Corporation, the Greater New York Hospital Association, a local hospital, and two local unions. The plaintiffs (appellees in this Court) asserted that the appellee health care providers will be required to pay additional state taxes and assessments if New York's pending waiver applications are ultimately denied, and that the President's cancellation of Section 4722(c) "reinstate[d]" the appellee providers' "exposure" to those tax obligations. J.A. 28-29.

The second suit, *Snake River Potato Growers, Inc.* v. *Rubin*, Civ. No. 97-2463 (D.D.C.), challenged the President's cancellation of Section 968 of the Taxpayer Relief Act. The plaintiffs in *Snake River* (appellees in this Court) are an Idaho farmers' cooperative and a potato grower who is a member, director, and vice-chairman of the cooperative. Appellees alleged that the cooperative is an "eligible farmers' cooperative" within the meaning of Section 968. J.A. 13. Appellees did not assert that the cancellation of Section 968 had affected or could affect their own tax liability. Instead, they alleged that the cancellation would make it more difficult, and "generally" more expensive, for the cooperative to purchase the facilities of agricultural processors who are supplied by the cooperative's members. J.A. 15.

d. The district court consolidated the *City of New York* and *Snake River* suits into a single proceeding.[3] The government moved to dismiss both suits on standing and

[3] A third suit challenging the constitutionality of the Act, *NTEU* v. *United States*, Civ. No. 97-2399 (D.D.C.), was also made a part of the consolidated proceeding. However, *NTEU* was subsequently resolved on non-constitutional grounds, and it is not a part of this appeal.

ripeness grounds, and the parties filed cross-motions for summary judgment on the merits. The district court denied the motion to dismiss and granted summary judgment to appellees in both suits. J.S. App. 1a-33a.

The court first held that the appellees in both cases have standing under Article III. J.S. App. 11a-21a. In *City of New York*, the court explained that Section 4722(c) provided a benefit to the appellee health care providers by protecting them from "any [state tax] liability that otherwise might befall them," and that "the President took that benefit away" when he cancelled Section 4722(c). *Id.* at 13a. The court dismissed as irrelevant the fact that New York is seeking administrative waivers and that the providers will not face new state tax liabilities unless the waivers are denied. *Id.* at 13a-14a. The court regarded it as "more likely than not" that New York will be required to refund at least some of its federal Medicaid payment at the conclusion of the administrative process, and "highly likely" that the providers will be required to indemnify New York for any such repayments. *Id.* at 15a.

In *Snake River*, the court concluded that the President's cancellation of Section 968 caused the appellees "an immediate, concrete injury" because it prevented them from competing "on equal footing with investor-owned businesses." J.S. App. 15a-16a.[4] The court construed this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), to hold that "the inability to compete on an equal basis in the bidding process is injury in fact."

[4] The court stated:

> Before section 968 was passed, investor-owned businesses could structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges. Farmers' cooperatives could not exchange their stock because a cooperative's stock can be held only by its members. Section 968 would have allowed sellers to defer capital gains taxes on sales to farmers' co-ops, thus putting co-ops in the same competitive position as investor-owned businesses.

J.S. App. 16a.

J.S. App. 16a. The court also found it "likely" that the appellees would have benefitted "in a concrete way" from the ability of sellers of agricultural processing facilities to defer capital gains under Section 968. *Id.* at 17a. Although Section 968 governed the tax liability of sellers, rather than that of purchasers, the court concluded that Section 968 would have "allow[ed] [appellees] to pay a lower purchase price" or, "at the very least," would have "give[n] [appellees] some room to negotiate in terms of price." *Id.* at 17a-18a.

On the merits, the district court held that the Act violates the Presentment Clause of Article I and principles of separation of powers. J.S. App. 22a-33a. The court acknowledged that "the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the" requirements of Article I. *Id.* at 24a. The court held, however, that the President's cancellation of individual items contained within those laws was constitutionally infirm because "[t]he laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." *Ibid.* The court concluded that "[b]ecause the Line Item Veto Act produced laws in violation of the requirement of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirement that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I." *Id.* at 27a. The court also held that the Act offends separation of powers principles because it authorizes the President to perform "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." *Id.* at 29a.

SUMMARY OF ARGUMENT

1. Appellees cannot satisfy the requirements of Article III. Appellees in *City of New York* contend that the challenged cancellation will likely lead to a decrease in federal Medicaid payments to the State of New York, and

that the State will ultimately recoup the funds from appellees. The cancellation at issue here, however, will have no effect upon New York's entitlement to funds unless and until HHS denies the State's waiver applications. And even if some or all of those applications are ultimately denied, any financial loss that appellees may suffer will result from the independent decisions of New York legislative and executive officials regarding the appropriate structure and implementation of the State's tax laws. Because appellees cannot demonstrate either that they are faced with actual or imminent injury, or that any harm they may ultimately suffer would be fairly traceable to the challenged cancellation, they cannot satisfy the requirements of Article III.

The *Snake River* appellees' suit likewise requires considerable speculation as to the likely behavior of persons not before the Court. The cancellation that appellees challenge could not affect their own tax liabilities. Appellees contend that the cancelled tax provision would have created incentives for agricultural processors to sell their facilities, and that appellees' chances of purchasing such facilities on favorable terms will be enhanced if the cancellation is held invalid. This Court has been properly reluctant, however, to recognize standing on the part of litigants who are not themselves the objects of the federal tax provisions that they wish to challenge. In the instant case, appellees have failed to adduce facts showing either that the cancellation has prevented them from acquiring a processing facility, or that they would be able to acquire such a facility in the future if this suit were resolved in their favor.

2. The Line Item Veto Act is constitutional. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of a tax or spending bill while "returning" other provisions to Congress. The President remains subject to the constitutional obligation to sign or return, in its entirety, a bill presented to him by Congress. His cancellation authority under the Act

comes into existence only after a tax or spending bill has been passed by both Houses of Congress and approved, *in toto*, by the President.

The Act does not authorize the President to amend or repeal provisions of subsequent budgetary laws. Because Congress is presumed to legislate with an awareness of existing law, its passage of a spending or tax bill that does not otherwise specify the scope of the President's discretion must be construed to authorize him either to implement, or to cancel, each item covered by the Act. There is consequently no basis for the district court's view that the cancellations at issue in this case altered the laws passed by Congress or otherwise subverted the legislative will.

Finally, the scope of authority vested in the President by the Act is consistent both with historical practice and with this Court's decisions. From the beginning of the Republic, Congress has frequently conferred upon the President substantial discretion over the expenditure of appropriated funds. The Line Item Veto Act places constitutionally sufficient limits on the President's exercise of discretion over federal spending. The Act requires the President to cancel items "in whole" rather than in part and to devote any cancelled amounts to deficit reduction, and it provides meaningful guidance to the President in his decision whether particular items should be cancelled.

ARGUMENT

I. APPELLEES' CHALLENGE TO THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT IS NONJUSTICIABLE

Appellees' constitutional challenges to the Line Item Veto Act should be dismissed without reaching the merits, because those challenges are not justiciable. As an initial matter, it appears that most of the appellees do not have standing under the special statutory provision for constitutional challenges to the Line Item Veto Act, 2 U.S.C. 692(a)(1) (Supp. II 1996), because that Section provides for

suits only by an "individual" adversely affected by the Act. In ordinary usage, the term "individual" refers to a "single human being," *The Random House Dictionary of the English Language* 974 (2d ed. 1987); accord *Webster's Third New International Dictionary* 1152 (1986), not a corporation, cooperative, or governmental entity. See also 1 U.S.C. 1 (emphasis added) (the word "person" "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*").[5] In any event, appellees' claims are not justiciable under Article III of the Constitution.

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[5] While the bill that eventually was enacted into law as the Line Item Veto Act was under consideration, a judicial review provision was adopted as a floor amendment in both the House of Representatives and the Senate that would have provided for suits by "any Member of Congress." See 141 Cong. Rec. H1138-H1139 (Feb. 2, 1995); *id.* at S4244-S4245, S4259 (Mar. 21, 1995); see also *id.* at S4485 (Mar. 23, 1995) (bill as passed by Senate); *id.* at H5097 (May 17, 1995) (bill as passed by House). Before the bill was sent to conference, however, Senator Simon expressed concern that the judicial review provision might not accomplish its purpose because the federal courts had raised some question whether a Member of Congress has standing to pursue such a suit under Article III. He accordingly proposed that the bill be amended in conference to provide for a test challenge to be brought under the expedited judicial review provision not only by any Member of Congress, but also by "any person" adversely affected by the Act. See *id.* at S4476 (Mar. 23, 1995). Senator Simon sought and obtained assurances from Senator McCain, the manager of the bill in the Senate, that it would be the latter's intent to specify that "any person" could bring such a suit. *Ibid.* The bill reported by the conference committee and passed by Congress, however, provided for suits only by "any individual," rather than by "any person," adversely affected. The Conference Report recites the "any individual" language, but without any explanation as to why that language was chosen. See H.R. Conf. Rep. No. 491, *supra*, at 41; see also 142 Cong. Rec. S2942-S2943 (Mar. 27, 1996) (remarks of Sen. Byrd) (referring, without elaboration, to authorization for suits by "any individual").

Appellants did not argue in the district court or in the jurisdictional statement in this Court that the appellees who are not natural persons may not bring an action under 2 U.S.C. 692. To the extent that that Section's reference to "any individual" imposes a jurisdictional limitation (see *Steel Co.* v. *Citizens for a Better Envt.*, No. 96-643 (Mar. 4,

Article III confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997).

When a plaintiff seeks to predicate his standing on an anticipated future injury, he must show that the injury is "imminent." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 & n.2 (1992); *Bennett*, 117 S. Ct. at 1163; *Whitmore*, 495 U.S. at 155. The imminence requirement serves "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Defenders of Wildlife*, 504 U.S. at 564-565 n.2 (internal quotation marks omitted). A similar concern for the avoidance of premature and possibly unnecessary litigation underlies the requirement that a suit be "ripe" for adjudication. See *Warth* v. *Seldin*, 422 U.S. 490, 499 n.10 (1975) (noting "close affinity" between ripeness and standing doctrines). Both ripeness and standing principles serve to ensure that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity

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(Mar. 4, 1998), slip. op. 7), however, it presumably cannot be waived. Compare *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 522-523 & n. 3 (1991).

in the determination of real, earnest and vital controversy." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44-45 (1975). When a third party is the immediate object of the challenged governmental action, "it becomes the burden of the plaintiff to adduce facts showing that" the third party can be expected to behave "in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562 (citations omitted). The appellees in the instant case are not themselves the objects of the spending and tax provisions cancelled by the President, and the entities that *are* directly subject to those provisions are conspicuous by their absence from this litigation. Because appellees' claims of injury rest on speculation about the independent decisions of third parties whose future actions "the courts cannot presume either to control or to predict," *ibid.*, their claims are not justiciable.

A. *City of New York*

Appellees in *City of New York* do not contend that the President's cancellation of Section 4722(c) of the Balanced Budget Act of 1997 will or could affect their own entitlement to receive funds from the federal government. Any such contention would be implausible, since federal payments under the Medicaid program are made exclusively to participating States, not to health care providers or local governments. See J.A. 37. Rather, appellees contend that (1) the challenged cancellation will likely lead to a decrease in federal Medicaid payments to the State of New

York, and (2) the State will ultimately recoup the lost funds from the appellee health care providers. See J.A. 27-29.[6] Because appellees are not presently faced with any actual or imminent injury, and because any harm they may ultimately suffer would not be fairly traceable to the challenged cancellation, appellees cannot satisfy the requirements of Article III.

1. As we explain above (see p. 10, *supra*), the President's cancellation of Section 4722(c) has thus far effected no reduction in federal Medicaid payments to the State of New York. See J.A. 40. The State has continued to receive exactly the same amount of federal money as it would have received if Section 4722(c) had not been cancelled. *Ibid.* Federal payments to New York will remain unaffected unless and until the State's waiver applications are denied by the Secretary. J.A. 38-39. If New York is entitled to the waivers, as it claims to be, no reduction will occur.

This Court has previously recognized that the possibility of future financial loss may be insufficient to create a justiciable dispute where the occurrence of the loss is contingent on the outcome of an as-yet unresolved administrative waiver application. In *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam), for example, California residents brought suit to challenge the constitutionality of a state law that provided lower benefits to new residents than to long-term residents under the Aid to Families with Dependent Children (AFDC) program. Federal law required California to obtain a waiver from HHS in order to impose the AFDC payment differential, and the California statute provided that the differential would take effect only if such a waiver were granted. See *id.* at 558-559.

[6] The district court in *City of New York* confined its standing analysis to the appellee health care providers, who would be the direct objects of the state taxes in question. See J.S. App. 13a n.8. The standing of the other appellees in that suit is purely derivative of the claimed standing of the providers. See J.A. 29-30. We therefore direct the following discussion to the standing of the providers.

California received an HHS waiver, but the waiver was invalidated by a federal court of appeals. *Id.* at 559.

When the constitutional challenge reached this Court, a second California waiver application was pending before HHS. See Tr. Oral Arg. 6, 31 (No. 94-197); Resp. Br. 9 & n.6, 49 (No. 94-197). The Court held that in light of the uncompleted waiver process, "no justiciable controversy is before us, because the case in its current posture is not ripe." 513 U.S. at 559. The Court pointed out that "[a]bsent favorable action by HHS on a renewed application for a waiver, California will continue to treat [the plaintiffs] the same way it treats long-term California residents." *Ibid.* The Court therefore concluded that "[t]he parties have no live dispute now, and whether one will arise in the future is conjectural." *Ibid*; see also, *e.g.*, *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997) ("where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his [taking] claim"); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984) (constitutional challenge to arbitration scheme not ripe until arbitrator has made an award); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981).

As in *Anderson*, appellees' potential injury depends on a future decision by the Secretary of HHS regarding the appropriate disposition of a State's waiver application. Only if the Secretary at that point finally determined that some or all of the state taxes do not satisfy the requirements of 42 U.S.C. 1396b(w), thereby triggering a reduction of funding to the State, would the predicate for the providers' liability to the State under state law for the amount then owed by the State to the federal government come into being. Appellees' claim therefore involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (citation

omitted). At least until that time, appellees have no basis for an action against the United States.[7]

Any attempt to predict the outcome of the administrative process is inescapably speculative, because "the courts are unable to evaluate with any assurance the 'likelihood' that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion." *ASARCO* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.).[8] Contrary to the district court's conclusion (see J.S. App. 14a), the outcome of the administrative proceedings is not foreordained by HHS's prior assertion that, in the absence of new legislation, "the Secretary will move forward to complete the process already begun to apply with full force the current law." HHS's commitment to "apply with full force the current law" is in no way inconsistent with the future granting of waiver applications, since the waiver mechanism is itself part of "current law." See pp. 9-10, *supra*.[9]

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[7] Cf. *United States* v. *California*, 507 U.S. 746, 756 (1993) (quoting *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 242 (1947)) (a subrogee "stands in the place of one whose claim he has paid").

[8] The district court's reliance (see J.S. App. 14a) on *INS* v. *Chadha*, 462 U.S. 919, 936-937 (1983), is misplaced. The petitioner for review (plaintiff) in *Chadha* was himself the direct object of the contested government action (a deportation order); he had already exhausted available administrative procedures to prevent entry of that order; and the order was therefore final and subjected him to immediate injury through removal from the country. Here, by contrast, the appellees are not the object of the cancelled spending provision, and the entity that is—the State of New York—is actively pursuing an administrative process that may afford it (and appellees) complete relief, and that thus far has insulated it (and the appellees) from any financial injury.

[9] The district court also believed that the President himself had foretold the eventual denial of New York's waiver applications when he certified, as required by the Act, that cancellation of Section 4722(c) "will reduce the Federal budget deficit." See J.S. App. 14a-15a, 61a-63a. The court misunderstood the significance of the President's certification. When Section 4722(c) was enacted into law, under the settled "scoring" rules used by the Office of Management and Budget (OMB) and the Congressional Budget Office, the provision was deemed

2. Even if New York's pending waiver applications are ultimately denied, nothing in federal law requires the State to seek recoupment from the appellee health care providers or otherwise limits the State's discretion regarding the appropriate response to the loss of federal funds. Any financial loss that appellees may suffer will result from independent decisions of state legislative and executive officials regarding the appropriate structure and implementation of the State's tax laws. Appellees' injury, if and when it occurs, therefore would not be "fairly traceable" to the President's cancellation of Section 4722(c).[10]

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to constitute approximately $200 million in "new direct spending" for purposes of the Line Item Veto Act—that is, a $200 million "increase in budget authority * * * relative to the most recent levels calculated pursuant to [2 U.S.C.] 907." 2 U.S.C. 691e(8) (Supp. II 1996). When the President cancelled Section 4722(c), the cancellation resulted in a corresponding $200 million reduction in budget authority. 2 U.S.C. 691e(4)(B) (Supp. II 1996); see J.S. App. 65a. The President's certification reflects that reduction in budget authority. The Act does not obligate the President to predict the future outcome of an administrative process, and his certification does not reflect such a prediction.

The district court also relied on a statement by the Director of OMB that New York's health care taxes "had been determined by HCFA to be illegal." J.S. App. 15a; see J.A. 68. That statement refers to HCFA's *initial* determination regarding the permissibility of the taxes in 1994 (see p. 10 *supra*), not to any determination regarding the merit of New York's subsequent waiver applications. The OMB Director also observed that the effect of the cancellation "will be that New York will be treated the same as the other states. And HHS is in the process now of resolving with those states how they will be treated with regard to the implications of these taxes in the past." J.A. 70.

[10] Article III's traceability requirement concededly "does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Bennett*, 117 S. Ct. at 1164. But where the "someone else" is a sovereign State, courts should not lightly conclude that the State's choices are "determin[ed] or coerc[ed]" by federal policy. In the present case, federal law places no constraints on the State's discretion regarding the appropriate response to any budgetary shortfall that may result if HCFA ultimately denies New York's waiver applications.

In *Warth* v. *Seldin*, 422 U.S. 490 (1975), a number of plaintiffs brought suit to challenge the legality of exclusionary zoning practices by Penfield, a suburban community in the vicinity of Rochester, New York. Among the plaintiffs were Rochester taxpayers who claimed to be injured financially by Penfield's exclusionary regulations. See *id.* at 508. The Rochester taxpayers asserted "that Penfield's persistent refusal to allow or to facilitate construction of low-and moderate-cost housing force[d] the city of Rochester to provide more such housing than it otherwise would do," *ibid.*, and that Rochester taxpayers would ultimately be required to bear higher local property taxes to pay for the cost of such housing, *id.* at 508-509. This Court held that the taxpayers' allegations failed to establish the necessary causal nexus between Penfield's zoning regulations and their own tax liabilities. The Court explained:

> Apart from the conjectural nature of the asserted injury, the line of causation between [the suburb's zoning] actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

Id. at 509.

Similarly here, any future increase in the appellee health care providers' tax liabilities under New York law "results only from decisions made by the appropriate [State] authorities, who are not parties to this case." The independent authority of New York legislative and executive officials to enact and administer state tax provisions severs the "line of causation" between the President's cancellation of Section 4722(c) and any injury appellees may eventually suffer. Accord *Young* v. *Klutznick*, 652 F.2d 617, 624-625 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993), cert. denied, 510 U.S. 1176 (1994).[11]

3. The district court also concluded that the appellee health care providers "suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c)." J.S. App. 13a. The court held that Section 4722(c) furnished the providers with "a valuable protection against any [state tax] liability that otherwise might befall them," and that the elimination of that protection subjected appellees to a present, judicially cognizable injury. *Ibid.* That holding cannot be reconciled with this Court's precedents. The Court has repeatedly emphasized that a plaintiff's injury must be "concrete," *Defenders of Wildlife*, 504 U.S. at 560, and "palpable," *Warth*, 422 U.S. at 501, and that "[a]llegations of possible future injury do not satisfy the requirements of Art. III," *Whitmore*, 495 U.S. at 158. Those principles would be

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[11] In *Young*, the City of Detroit brought suit to challenge the federal government's administration of the 1980 census. Detroit asserted that the census had undercounted the city's population and that it would be injured by the Michigan legislature's use of the census figures to apportion congressional districts within the State. The Sixth Circuit held that federal law did not prevent the Michigan legislature from adjusting the census data for intrastate apportionment purposes and that the possibility of such an adjustment made the plaintiffs' asserted injury too speculative to permit adjudication of the suit. 652 F.2d at 625. In response to the plaintiffs' argument that the legislature was likely to use the unadjusted data, even if it was not legally compelled to do so, the court of appeals stated: "Having found no legal compulsion that the state act in a certain way, we may not predict what decisions the state legislature will, in fact make. * * * Thus we simply do not know whether plaintiffs will be harmed by the decision of the Bureau [of the Census] not to adjust its figures." *Ibid.* In *City of Detroit*, the court relied on its prior decision in *Young* in holding that the plaintiffs lacked standing even though redistricting (using the Census Bureau figures) had already occurred. The court explained that "if the Michigan legislature is not constitutionally compelled to use the Bureau's census data, then its decision (whether to use the data or not) is an independent act breaking the chain of causation between the challenged actions of the Census Bureau * * * and the injury to the plaintiffs." 4 F.3d at 1373.

wholly undercut if the absence of an absolute "protection" against possible future harm could be characterized as a judicially cognizable present injury.[12]

B. *Snake River*

1. Like the appellees in *City of New York*, the appellees in *Snake River* are not themselves "the object[s] of the government action * * * [they] challenge[]." *Lujan*, 504 U.S. at 562. As we explain above, Section 968 of the Taxpayer Relief Act of 1997 permitted taxpayers who sell the stock of "qualified" agricultural refiners or processors to "eligible" farmers' cooperatives to defer recognition of the capital gains, if any, resulting from such sales. See 26 U.S.C. 1042; J.S. App. 72a-74a. Section 968 alters the tax liabilities of sellers, not those of purchasers. As a result, the President's cancellation of Section 968 can have no effect on the tax liabilities of appellees, who wish to purchase agricultural processing facilities rather than to sell them.

Appellees allege that the cancellation of Section 968 will harm them by changing the financial terms on which Snake River might be able to purchase the stock of

[12] Under some circumstances, a plaintiff may be able to establish standing by demonstrating that prolonged uncertainty concerning the applicable law would subject him to substantial hardship. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 154 (1967) (plaintiffs had standing to assert facial challenge to regulation that "require[d] them to make significant changes in their everyday business practices" and established substantial penalties for noncompliance). The cancellation at issue in the instant case, however, effects no change in the legality of appellees' own conduct. And while appellees have alleged in general terms that the cancellation burdens their "present abilities to engage in meaningful planning and borrowing of funds," J.A. 29, they have failed to identify any concrete instance in which the cancellation has affected their own present conduct or the willingness of others to transact business with them. Appellees acknowledged in the district court, for example, that the health care providers have not created a reserve to cover their potential liability to the State of New York, Tr. Oral Arg. 14 (D.D.C. Jan. 14, 1998), much less been required by law to do so.

qualified agricultural processors. See J.A. 15. They allege that Section 968 "would have allowed Snake River to offer * * * a lower price" for processing facilities and would have "encouraged" processors to accept such offers. *Ibid.* They further allege that, "[a]s a result of the cancellation of Section 968," Snake River must "generally" pay more for processing facilities "because the seller will owe taxes currently on any [capital] gain on the sales." *Ibid.* The appellees contend, in other words, that they will suffer an indirect financial injury because of the response of third parties (agricultural processors) to the cancellation of Section 968.

This Court has been properly reluctant to recognize standing on the part of litigants who are not themselves the objects of the federal tax provisions that they wish to challenge. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, the Court held that low-income persons who had been denied treatment at local hospitals lacked standing to challenge an Internal Revenue Service (IRS) revenue ruling that was alleged to have reduced the amount of charitable care needed for the hospitals to qualify for tax-exempt status. See 426 U.S. at 28-33, 40-41. The Court found it "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. The Court likewise found it speculative whether invalidation of the revenue ruling would lead the hospitals to serve the plaintiffs, since it was "just as plausible" that the hospitals might elect to forgo the tax exemption in order to avoid the financial burden of increased charitable care. *Id.* at 43.

Similarly, in *Allen* v. *Wright*, *supra*, the Court held that parents of black children attending public schools lacked standing to challenge IRS policies concerning tax exemptions for racially discriminatory private schools. The parents alleged, *inter alia*, that federal tax exemptions for discriminatory private schools "impair[ed] their

ability to have their public schools desegregated." 468 U.S. at 752-753. The Court concluded, however, that the plaintiffs' alleged injury was "not fairly traceable to the Government conduct * * * challenge[d] as unlawful." *Id.* at 757. The Court also found it "entirely speculative" whether withdrawal of a tax exemption would lead any particular discriminatory school to change its policies and whether any such change in policy would lead any given parent to transfer his or her child to public school. *Id.* at 758. In *Allen*, as in *Simon*, the inescapably speculative nature of a third party's response (if any) to changes in federal tax laws prevented the plaintiffs from establishing the necessary causal connection between the asserted illegality and any injury to themselves.

The district court sought to distinguish *Simon* and *Allen* on the ground that in those cases "there was arguably some disincentive to the institutions' taking advantage of the tax benefit" in question. J.S. App. 20a. In this case, by contrast, the district court believed that there would be no "'cost' to the selling processors and refiners in taking advantage of the tax benefits that section 968 would offer." *Ibid.* That reasoning is unsound. The tax benefits provided by Section 968 are contingent on a processor's decision to sell facilities in the first place, when in fact any given processor might have no interest in doing so. Because the likely tax treatment of any capital gain is only one of many factors bearing on a processor's decision whether to undertake a particular transaction, the effect (if any) of Section 968 on the general availability of processing facilities is inherently speculative. It is also uncertain whether any sales facilitated by Section 968 would be made to appellees, and whether the seller in any such transaction would choose to share any resulting tax benefits with the purchaser rather than to retain those profits for itself.

2. Appellees allege that the cancellation of Section 968 has already injured them by "interfering" with plans to acquire a specific processing facility. J.A. 15-16, 112-114.

They allege that, in anticipation of the enactment of Section 968, they had entered into discussions with the principal owner of a corporation named Idaho Potato Packers (IPP) regarding the "possibility" that Snake River "might" purchase an IPP processing facility in a transaction structured to defer the seller's recognition of capital gains. J.A. 112. According to the appellees, IPP "expressed an interest" in such a transaction, and Snake River "anticipated" that it would complete the transaction if Section 968 were enacted. J.A. 112, 16. Appellee Cranney stated that the cancellation of Section 968 "caused me to terminate discussions with" IPP because it was "clear" to Cranney that IPP would demand a higher price and "might" be unwilling to sell at "any acceptable price" without the tax benefit created by Section 968. J.A. 114. Cranney also stated that he "believe[s]" that IPP "remains interested" in a deferred-recognition sale. J.A. 114-115.

Appellees' vague and conclusory allegations fall well short of establishing that the sale discussed by Snake River and IPP would have been consummated if Section 968 had not been cancelled. Indeed, the district court declined to "speculate" whether the possible transaction with IPP "would have been brought to fruition but for the President's cancellation of section 968, or even if that particular deal would have satisfied the requirements of section 968." J.S.App. 21a.[13] "Prior decisions of this Court

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[13] For several reasons, it is far from clear that the transaction described by appellee Cranney would actually have enabled IPP to defer recognition of its capital gain pursuant to Section 968. First, a seller could have qualified for deferred recognition of capital gains under Section 968 only if it had purchased more than 50 percent of its agricultural products from the purchasing cooperative or the cooperative's members during the year preceding the sale. See J.S. App. 73a. Cranney's declaration, however, alleges only that IPP "acquired more than 50% of [its] potatoes from members *and farmers eligible to become members* of Snake River" during the preceding year. J.A. 112 (emphasis added). The purchase of products from farmers who

establish that unadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44.[14]

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were merely *eligible* to become members of a cooperative would not have satisfied the statutory requirement.

Second, appellees assert that IPP would have carried out the proposed transaction by "plac[ing] the [processing] facility in a wholly owned subsidiary, which IPP would then sell to Snake River." J.A. 113. Since it apparently was proposed that Snake River would purchase the stock of the subsidiary, the proposed transaction would not have qualified under Section 968 unless and until the subsidiary (rather than IPP) had purchased 50 percent of its agricultural products from Snake River and its members "during the 1-year period ending on the date of the sale." J.S. App. 73a. Thus, the transaction could not have taken place for at least one year after the transfer of the facility to the subsidiary, which presumably has yet to occur, and it is a matter of speculation whether or when the subsidiary would be able to satisfy the 50 percent requirement.

Finally, the very act of transferring the facility from IPP to a wholly owned subsidiary might have required IPP to recognize the capital gain immediately, making the applicability of Section 968 to the subsequent transfer to Snake River worthless. Although the placement of assets into a newly formed subsidiary is ordinarily a nontaxable event, see 26 U.S.C. 351, that rule does not apply if the contribution of assets is merely the initial step of a prearranged and integrated transaction designed to result in the sale of the assets to a third party. See, *e.g.*, Rev. Rul. 70-140, 1970-1 C.B. 73; *Intermountain Lumber Co.* v. *Commissioner*, 65 T.C. 1025 (1976).

[14] The district court's reliance (J.S. App. 18a) on *Bryant* v. *Yellen*, 447 U.S. 352 (1980), is misplaced. *Bryant* involved Section 46 of the Omnibus Adjustment Act of 1926, which limited federal water deliveries to 160 acres per owner and provided that any sale of excess acreage be at prices that did not reflect the value added by the availability of water from the reclamation project. See 447 U.S. at 360, 367 n.17. This Court held that a group of farm workers who wished to purchase land in the Imperial Valley of California had standing to seek a declaratory judgment that all private farm land in the Valley was subject to Section 46. See 447 U.S. at 366-368. The law at issue in *Bryant*, by making the continued availability of federal water deliveries contingent upon the owner's sale of any excess acreage at below-market prices, exerted a "determinative or coercive effect," *Bennett*, 117 S. Ct. at 1164, upon owners of excess lands to sell their land, and to do so at prices substantially below its market value. See *Bryant*, 447 U.S. at 367 (noting, with apparent approval, the court of appeals' conclusion

Appellees have also failed to adduce facts demonstrating that IPP or any other processor in fact still wishes to pursue a transaction with them, or that appellees' injury could be redressed by a declaration in this case that the cancellation was invalid. See *Warth*, 422 U.S. at 507 (plaintiffs' reliance on the remote possibility, unsubstantiated by allegations of fact, that their situation might improve were the Court to afford relief held to be insufficient to confer standing). Compare *Spencer* v. *Kemna*, No. 96-7171 (Mar. 3, 1998) (court lacks jurisdiction to consider claim of prior illegality where change in circumstances prevents the entry of meaningful relief); *Steel Co.* v. *Citizens for a Better Envt.*, No. 96-643 (Mar. 4, 1998), slip op. 25; *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983).[15]

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that "it would be highly improbable that all owners of excess lands would prefer to withdraw their irrigable lands from agriculture in order to avoid § 46"). Section 968, by contrast, would leave owners of agricultural processing facilities free either to retain ownership of those facilities without suffering any adverse consequences in their ongoing operations, or (if they chose to sell) to decline to share their tax benefits with the purchaser.

[15] The justiciability problem in this case is underscored by the difficulties inhering in the nature and scope of the relief awarded. Although the district court entered a declaratory judgment that the Line Item Veto Act is unconstitutional, J.S. App. 32a-33a, that declaratory judgment has binding effect only between appellees Snake River and Cranney on the one hand and the federal appellants on the other. See *United States* v. *Mendoza*, 464 U.S. 154 (1984). The district court's judgment in this one case does not render the Line Item Veto Act (or even the President's cancellation of the limited tax benefit conferred by Section 968) invalid as against the world at large. As a result, if at some point in the future Snake River were to purchase a processing facility in a transaction that would otherwise comply with Section 968, the United States would not be required by the district court's judgment in this case to accord the *seller* in that hypothetical future transaction the special tax benefits conferred by Section 968. The United States could be required to do so only if appellees Snake River and Cranney were entitled, in bringing this suit at the present time, to rely for their claim of injury, causation and redressability on the possible tax advantages that might accrue to any member of the class of *all* potential future sellers of processing facilities to Snake River.

This Court should be particularly reluctant to assume that the postulated chain of events would actually have occurred, or that invalidation of the challenged cancellation would enable appellees to purchase processing facilities, in light of the fact that IPP itself has declined to challenge the cancellation. Indeed, appellees have failed to submit any direct evidence (such as an affidavit from an IPP official) regarding the effect (if any) of the challenged cancellation on IPP's willingness to consummate the transaction.

3. The district court also held that the challenged cancellation subjected appellees to an "immediate" injury by depriving them of the ability to compete on an "equal footing" with investor-owned businesses. J.S. App. 15a-17a. The district court interpreted this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), to stand for the proposition that "the inability to compete on an equal basis in the bidding process is injury in fact." J.S. App. 16a.[16]

That sort of proceeding—which is in substance a request for an advisory opinion regarding the tax consequences for other persons of a hypothetical future transaction—is far removed from the "cases and controversies of the sort traditionally amenable to and resolved by the judicial process." *Steel Co.*, slip op. 17.

[16] In concluding that the cancellation of Section 968 deprived appellees of the opportunity to compete "on equal footing with investor-owned businesses," the court observed that investor-owned businesses, unlike farmers' cooperatives, can "structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges." J.S. App. 16a; see note 4, *supra*. An investor-owned business's earnings from the operations of a processing facility, however, are taxed twice: once at the corporate level, and a second time after profits are distributed to shareholders. The Code establishes a different regime for farmers' cooperatives, under which income generally is taxed only when it reaches the farmers. See 26 U.S.C. 521, 1381, 1382. Even after the cancellation of the tax benefits conferred by Section 968, that advantage counterbalances the investor-owned business's ability to undertake a stock-for-stock exchange.

The court's reliance on *Northeastern Florida* is misplaced. The plaintiff in *Northeastern Florida* asserted that its members had been denied the opportunity to bid on certain government contracts on the basis of race, in violation of the Equal Protection Clause. See *id.* at 658-659. The Court held that the plaintiffs could establish standing without alleging that they would have obtained particular contracts if the challenged discrimination had not occurred. See *id.* at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). Appellees, by contrast, have not asserted an equal protection claim. Nor do they contend that the challenged cancellation has directly imposed any burden upon them. Their challenge is instead directed at the purportedly unlawful denial of favorable tax treatment to *other* private parties. Nothing in *Northeastern Florida* suggests that such a challenge is cognizable by a federal court.

II. THE LINE ITEM VETO ACT IS CONSTITUTIONAL

A. Cancellation Of Tax Or Spending Items Pursuant To The Line Item Veto Act Is Consistent With The Constitutional Requirement That The President "Sign" Or "Return" A Presented Bill *In Toto*

The Presentment Clause of Article I requires that "[e]very Bill" passed by Congress "shall, before it become a Law, be presented to the President." Art. I, § 7, Cl. 2.[17]

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[17] Article I, Section 7 actually has two Presentment Clauses: Clause 2, which applies to "Bill[s]," and Clause 3, which applies to all "Order[s], Resolution[s], or Vote[s] to Which The Concurrence of the Senate and House of Representatives may be necessary." Clause 3 was adopted to prevent evasion of the presentment requirement "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'" *INS* v. *Chadha*, 462 U.S. 919, 947 (1983). For the sake of simplicity, we refer exclusively to Clause 2 in the text, but the discussion applies equally to both Presentment Clauses.

When a bill is presented to the President, the Presentment Clause gives him two options: if he "approve[s]" the bill, "he shall sign it," and if he does not approve the bill, "he shall return it, with his Objections to that House in which it shall have originated."[18] As the district court recognized, see J.S. App. 26a, the President is required to sign or return a presented bill *in toto*; he is not empowered to sign some portions of the bill and return others.

The Line Item Veto Act is consistent with that requirement. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress.[19] By its terms, the Act applies only to "bill[s] or joint resolution[s] that ha[ve] been signed into law pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996). When the President signs a tax or spending bill, "[the] bill when so signed becomes from that moment a law." *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454 (1899); *United States* v. *Will*, 449 U.S. 200, 224-225 & n.29 (1980) (President's signature marks "the precise time the statute became law"). Thus, the President's cancellation authority under the Act comes into existence only *after* the requirements of the Presentment Clause have been satisfied. See H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 20 (1996) ("[T]he cancellation authority only becomes effective after the President has exercised the

[18] If the President neither signs the bill nor returns it within 10 days, the bill "shall be a Law, in like Manner as if he had signed it," unless Congress has by its adjournment prevented the bill's return, in which case the bill "shall not be a Law." Art. I, § 7, Cl. 2; see generally *The Pocket Veto Case*, 279 U.S. 655 (1929).

[19] Although the word "veto" is commonly used to describe the President's power to "return" a disapproved bill to the House of Congress in which it originated, see *Chadha*, 462 U.S. at 925, the word "veto" does not appear in the Presentment Clause, or anywhere else in the Constitution. The presence of the term in the title of the Act has the same constitutional significance as the absence of the term from the Presentment Clause—none.

constitutional authority to enact legislation in its entirety.").[20]

In recent years, Presidents have regularly been compelled to make all-or-nothing decisions to accept or reject large combinations of multifarious spending items. The need for such choices is not, however, the inevitable consequence of the constitutional requirement that the President sign or return a presented bill *in toto*. Rather, such decisions have been necessitated by the *in toto* requirement *in conjunction with* the recent congressional practice of (1) routinely combining numerous and diverse spending items in a single bill, and (2) sharply restricting the President's authority to decline to spend appropriated funds. Congress may not, of course, alter the requirements of the Presentment Clause. It may, however, quite legitimately take into account the practical impact of those requirements in determining what types of bills it will pass.[21] The effect of the Line Item Veto Act is to vest the President with greater discretion than he would otherwise possess in the administration of federal spending and tax laws *after* they are enacted. The Act

[20] A bill returned to Congress can be enacted into law if, but only if, it is subsequently approved by two-thirds of each House. U.S. Const. Art. I, § 7, Cl. 2. A presidential cancellation pursuant to the Line Item Veto Act, by contrast, can be overturned by new legislation passed by a simple majority of each House, see 2 U.S.C. 691d (Supp. II 1996), subject to a possible presidential veto and subsequent override. That is the method that Congress is required to employ whenever it disapproves of the manner in which the Executive Branch has exercised discretionary authority conferred by Act of Congress. See *Chadha*, 462 U.S. at 954-955, 958.

[21] Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might (at least in theory) adopt the practice of voting separately upon each line item, thus causing each item of spending to be passed as a separate bill, which the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

thus enhances the President's role in the fashioning of national fiscal policy, while remaining faithful to the procedural requirements of Article I.

B. Cancellation Of Tax Or Spending Items Pursuant To The Line Item Veto Act Does Not Effect An Amendment Or Repeal Of Any Enacted Law

The district court acknowledged that "the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the Article I requirements" that an enacted law must be passed by both Houses of Congress and approved, in its entirety, by the President. J.S. App. 24a. The court asserted, however, that

> the Line Item Veto Act then authorized the President to violate those requirements by producing laws that had not adhered to those requirements. Both Houses of Congress, through a process of discussion and compromise, had agreed upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act. These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid.

Id. at 24a-25a. The court's analysis reflects a fundamental misunderstanding of the relationship between the Line Item Veto Act and subsequent tax and spending laws.

1. Although Article I vests "[a]ll legislative Powers" in Congress (Art. I, § 1), it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1988). This Court has long recognized that "no valid objection can be made" to statutory provisions "conferring authority or discretion" on the President regarding the execution of federal laws. *Field* v. *Clark*, 143 U.S. 649, 693-694 (1892); accord, *e.g.*, *Touby* v. *United States*, 500 U.S. 160, 165 (1991).[22] The Constitution does not require that Congress vote to approve the specific discretionary policy choices made by Executive Branch officials pursuant to a general statutory grant of authority. See *Chadha*, 462 U.S. at 953 n.16 (the lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of

[22] In *Field*, importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on specified commodities. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612. The importers argued that the suspension provision unconstitutionally delegated lawmaking power to the President. 143 U.S. at 681. The Court rejected that contention. It noted that the President's power to suspend the provisions of the 1890 Act "was a part of the law itself as it left the hands of Congress," and explained that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (internal quotation marks omitted).

The Court has also sustained the related congressional practice of vesting the Executive Branch with discretionary authority to create exemptions from federal laws or otherwise limit their scope. For example, the former Interstate Commerce Act, while generally prohibiting carriers from offering long-haul discounts, "gave an authority to the Interstate Commerce Commission * * * to grant relief from this prohibition," authority that was "undefined except as the general purposes of that Act implied the basis for affording exemption." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). In the *Intermountain Rate Cases*, 234 U.S. 476, 486-489 (1914), the Court squarely rejected a claim that Congress had conferred Article I legislative power on the Executive Branch by authorizing the Commission to create exemptions from the long-haul discount prohibition.

the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7").[23]

Contrary to the district court's suggestion, the Line Item Veto Act does not authorize the President to amend or repeal subsequent tax or spending laws. The Act simply establishes a "default rule," cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272 (1994), that defines the extent of the President's discretion in the administration of such measures in the absence of an express contrary provision contained in a particular law. Congress retains the power to render the Act's provisions inapplicable, or otherwise to alter the scope of the President's authority, with respect to any particular bill. See *Raines*, 117 S. Ct. at 2320 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act"). Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), a spending or tax bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to implement, or to cancel, each item covered by the Line Item Veto Act.

[23] The district court asserted that "[t]here is no way of knowing whether" Congress would have passed the Balanced Budget and Taxpayer Relief Acts if it had foreseen the manner in which the President would exercise his cancellation authority. J.S. App. 24a. It is possible, of course, that some Members of Congress who voted for those laws would not have done so if they had foreseen that particular items they favored would be cancelled. But it is also possible that other Members supported the Balanced Budget and Taxpayer Relief Acts *only* because they understood that the President retained the power to cancel spending and tax items that he believed to be unwarranted. Such speculation is irrelevant, however, to the legal issues presented by this case. The validity of Executive Branch conduct does not depend upon a showing that Congress considered and approved the specific policy determinations underlying the President's execution of the laws. Indeed, this Court has recognized that Executive Branch officials may appropriately be vested with discretionary "policymaking responsibilities" where "Congress [i]s unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

A plaintiff who has been injured by the cancellation of a tax or spending item is always free to argue that the cancellation was unauthorized by law, either because the item in question was not cancellable under the terms of the Line Item Veto Act, or because the particular budgetary law in which that item was contained divested the President of the cancellation authority that he would otherwise have possessed. Appellees have not made either of those contentions. Rather, they have (implicitly) acknowledged that the Balanced Budget and Taxpayer Relief Acts, read (as those Acts must be) against the backdrop of existing law, authorized the cancellations at issue in this case. In light of that concession, the President's exercise of cancellation authority cannot be said to have created laws "different from those consented to by both Houses of Congress." J.S. App. 24a.

There is consequently no basis for the district court's conclusion that the cancellations at issue in this case subverted the will of Congress. The possibility that individual items would be cancelled was an integral feature of both the Balanced Budget Act and the Taxpayer Relief Act at the moment of their passage.[24] When the President undertook the cancellations at issue here, he neither repealed nor amended the underlying spending and tax

[24] The possibility of cancellation was implicit in the Balanced Budget Act, since the Act contained numerous sections (including Section 4722(c)) providing for "item[s] of new direct spending" within the meaning of the Line Item Veto Act. The possibility of cancellation was an *explicit* feature of the Taxpayer Relief Act. Section 1701 of that Act contained an "identification of limited tax benefits subject to line item veto." 111 Stat. 1099; see note 2, *supra*. Section 968 of the Act was listed among those provisions. 111 Stat. 1101. Thus, while the district court was correct in stating that "[b]oth Houses of Congress * * * agreed upon the exact content of * * * the Taxpayer Relief Act," J.S. App. 24a, part of that "content" was a provision expressly identifying Section 968 as an item "subject to line item veto."

laws; he administered them in accordance with their terms.

2. The district court found it significant (see J.S. App. 25a-26a) that cancellation under the Act "rescind[s]" discretionary budget authority and renders items of new direct spending and limited tax benefits without "legal force or effect." 2 U.S.C. 691e(4)(A)-(C) (Supp. II 1996). This Court, however, has discussed with approval statutory provisions phrased in similar terms. In *Field*, for example, the Court cited a customs statute providing that specified tariff acts "shall be repealed" if the President declared that discriminatory foreign tariffs had been abolished, see 143 U.S. at 687 (citing Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425), and an import statute authorizing the President to "declare the provisions of this act to be inoperative, and the same shall be afterwards inoperative and of no effect from and after thirty days from the date of said proclamation," *id.* at 688 (citing Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 3). Far from regarding those laws as constitutionally deficient, the Court cited them as historical support for the constitutionality of the tariff act at issue in *Field*. See also 28 U.S.C. 2072(b) ("All laws in conflict with" rules of practice and procedure promulgated by this Court "shall be of no further force or effect after such rules have taken effect."); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941); *Henderson* v. *United States*, 116 S. Ct. 1638, 1644 (1996); *Synar* v. *United States*, 626 F. Supp. 1374, 1387 (D.D.C. 1986), aff'd on other grounds, *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

In any event, the constitutional analysis in this case should turn on the *substance* of the powers vested in the President by the Line Item Veto Act. The President's authority to "cancel" tax and spending items is, in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures. If (as we argue above) such power is in substance a permissible form of discretionary administrative authority, Congress's use of infelicitous terminology cannot transform the cancellation into an unconstitutional amendment or repeal of an enacted law. See *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 267 (1991) ("separation-of-powers analysis does not turn on the labeling of an activity") (quoting *Mistretta*, 488 U.S. at 393); *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 n.7 (1981).

3. The district court also sought to distinguish the Line Item Veto Act from prior laws vesting the Executive Branch with administrative discretion, on the ground that the President's cancellation of a particular item under the Line Item Veto Act is irrevocable unless overturned by a subsequent disapproval bill. J.S. App. 30a. Executive Branch officials will often be required, however, to make irrevocable decisions within limited periods of time. The opportunity to pursue litigation on behalf of the government, for example, may be lost if the responsible executive officials fail to initiate a suit, or to file a notice of appeal, within the time set by statute. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994). There is consequently no basis for the district court's apparent conclusion that the freedom to change course is an essential attribute of the President's execution of the laws.

There is also no basis for supposing that the irrevocability of a cancellation increases the President's authority or threatens the separation of powers. To the contrary, the discretion conferred on the President by the Act is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made. If "reversible" cancellation authority is constitutionally permissible, then irreversible authority is valid *a fortiori*.

C. The Line Item Veto Act Does Not Effect A Delegation Of Legislative Power To The President

Although Congress may vest the Executive Branch with considerable discretion in the administration of

federal laws, it may not confer discretion so broad and unconstrained as to amount, in practical effect, to the delegation of legislative power. See *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting). The Line Item Veto Act operates to make specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met.[25] As we explain below, that grant of authority is fully consistent both with historical practice and with this Court's precedents.

1. ***The Line Item Veto Act is consistent with the historical understanding of Congress's power to confer spending discretion on the Executive Branch***

"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); see also *Mistretta*, 488 U.S. at 401 ("'traditional ways of conducting government * * * give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). As we explain above, the conferral upon the President of substantial discretion over the expenditure of appropriated funds has been a recurring practice of Congress under the Spending Clause from the beginning of the Republic. See pp. 2-5, *supra*; *Cincinnati Soap Co.* v.

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[25] In discussing the effect of the Act on spending bills, we use the terms "discretionary" and "mandatory" to distinguish between spending authority that the Executive Branch has discretion not to exercise and spending authority that the Executive Branch is legally obligated to exercise. Those terms are often used in a different sense in the federal budget process: "discretionary" spending signifies "programs that are subject to annual funding decisions in the appropriations process," while "mandatory" spending (also known as "direct" spending) means "all spending that is made pursuant to laws other than appropriations laws." Senate Comm. on the Budget, 104th Cong., 2d Sess., *The Congressional Budget Process: An Explanation* 5, 6 (Comm. Print 1996).

United States, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated governmental agencies.").

Congress has sometimes conferred that discretion in individual appropriations acts. At other times, Congress has given the President broad authority to withhold appropriated funds on a government-wide basis in order to pursue overarching budgetary goals of Congress's choosing. See pp. 3-5, *supra*. When Congress has given the President discretion over appropriated funds, it often has chosen not to impose binding restrictions on how that discretion is to be exercised. Thus, when Congress has passed lump-sum appropriations bills, see *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), or when it has given the President general authority to reduce government spending below appropriated levels, see pp. 3-5, *supra*, the President has been left largely free to exercise his own judgment regarding which spending programs to reduce and how much to reduce them. The degree of authority vested in the President has varied from time to time, in response to changing legislative judgments about the need for Executive Branch discretion. The extent of the Executive Branch's spending discretion has always been regarded, however, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

The practices of the First Congress regarding Executive Branch spending discretion are particularly instructive. Those acts "provide[] 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher* v. *Synar*, 478 U.S. at 723-724 (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)). As we explain above (see pp. 2-3, *supra*), the First Congress chose to fund the general operations of the federal government through lump-sum appropriations acts that

did not require the Executive Branch to spend the full amount of the appropriations.[26] The Members of the First Congress evidently saw no constitutional impediment to vesting the Executive Branch with broad discretion over the disposition of appropriated funds.

Viewed against this historical background, the Line Item Veto Act is hardly revolutionary. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations Congress has seen fit to impose. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion add "great weight," *The Pocket Veto Case*, 279 U.S. at 689, to the political Branches' shared judgment that the Line Item Veto Act satisfies the requirements of Article I. Cf. *Dames & Moore*, 453 U.S. at 668 ("When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress," and his actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation") (internal quotation marks omitted).

2. *The Line Item Veto Act is consistent with this Court's precedents applying the nondelegation doctrine*

a. In applying the nondelegation doctrine, this Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated

[26] The lump-sum appropriations passed by the First Congress did not vest the President with unlimited discretion over the use of the appropriated sums. Other statutes, such as those fixing the salaries of federal officers, effectively required the expenditure of a portion of the appropriations in specified ways. See, *e.g.*, Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 (salaries of executive officers). Nevertheless, Congress otherwise left the President free to decide how (and whether) to spend the funds.

authority.'" *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The touchstone of analysis is whether Congress has provided an "intelligible principle" for the exercise of executive discretion. *Mistretta*, 488 U.S. at 372; *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Applying the "intelligible principle" standard, the Court has repeatedly approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms," *Loving* v. *United States*, 116 S. Ct. 1737, 1750 (1996), sustaining the constitutionality of laws giving Executive Branch officials the authority to regulate broadcast licensing as required by "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943); to approve consolidation of carriers "in the public interest," *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); to recover "excessive profits" on military contracts, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948); to fix prices that "will generally be fair and equitable and will effectuate the purposes" of the law, *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944); and to determine "just and reasonable" natural gas rates, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).[27]

b. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191. "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose

[27] See also, *e.g.*, *Touby*, *supra*; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, *supra*; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *American Power & Light Co.*, *supra*; *J.W. Hampton*, *supra*; *Field*, *supra*; *Synar* v. *United States*, 626 F. Supp. at 1383-1384.

legally binding restrictions." *Id.* at 192 (internal quotation marks omitted). Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." *Cincinnati Soap Co.*, 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by law, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if the pertinent statutory provisions placed no further constraints on Executive Branch discretion.

c. In any event, the Line Item Veto Act places meaningful constraints on the President's decision whether to spend, or to cancel, individual items covered by the Act. To begin with, the Act permits the President to cancel items only "in whole," 2 U.S.C. 691(a), not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 491, *supra*, at 33. And because the Act's "lockbox" feature (see p. 7, *supra*) requires that any cancelled amounts be devoted to deficit reduction, there is no authority to divert cancelled funds for other purposes. The Act's requirement that each budgetary item must be devoted either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

In addition, the Act provides significant guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). The Act thereby "establishes clear preconditions to Presidential action," *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976), using criteria that are at least as

"intelligible" as those previously approved by this Court. See pp. 44-45 & note 27, *supra*.

The Act also requires the President to consider "the legislative history, construction, and purposes of the law which contains the" cancelled items, as well as "any specific sources of information referenced in such law"; to provide his estimate of the "fiscal, economic, and budgetary effect" of the cancellation; to estimate the "effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and to set forth the geographic distribution of the cancelled spending. 2 U.S.C. 691(b), 691a(b) (Supp. II 1996). The requirement that the President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, the Act places a substantial portion of the federal budget outside the scope of the President's cancellation authority altogether, by excluding spending for entitlement programs and other "direct spending" that results from previously-enacted laws. See 2 U.S.C. 691e(8) (Supp. II 1996) ("item of new direct spending" defined as "any specific provision of law that is estimated to result in an *increase* in budget authority or outlays for direct spending" over the budgetary "baseline") (emphasis added); note 1, *supra*. Because "Congress [has] clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373 (internal quotation marks omitted), the President's cancellation authority under the Act represents the Article II power to execute the laws of the United States, not the legislative power vested in Congress by Article I.

d. The district court regarded the President's cancellation of limited tax benefits as especially problematic.

See J.S. App. 30a.[28] However, the cancellation of limited tax benefits is also a form of discretionary administrative authority, not a form of statutory repeal. This Court has held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges," *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989), and Congress has frequently vested the President with discretionary authority over the imposition of taxes. See, *e.g.*, *J.W. Hampton*, 276 U.S. at 405-410 (rejecting nondelegation challenge to "flexible tariff" provisions of Tariff Act of 1922); *Field* v. *Clark*, 143 U.S. at 682-693 (rejecting nondelegation challenge to similar provision of Tariff Act of 1890 and citing many similar statutes).

Under the Line Item Veto Act, the President's authority to cancel limited tax benefits is governed by "intelligible principles." See pp. 46-47, *supra*. And because the provisions subject to cancellation will affect very small numbers of taxpayers, see 2 U.S.C. 691e(9)(A) (Supp. II 1996), the President has no wide-ranging authority to reshape the basic corpus of federal tax law. Cancellation of a limited tax benefit, moreover, does not subject the affected taxpayers to a special disadvantage; it simply ensures that

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[28] Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken. And the mere absence of a severability provision in the Act does not makes it "evident" that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

their tax liability is governed by the generally applicable requirements and prohibitions imposed by the remainder of the Internal Revenue Code. The cancellation at issue in *Snake River* is therefore fully consistent with this Court's precedents.

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

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